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NO. 83 - 1554

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

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SUPREME COURT, U.S.

UNITED STATES OF AMERICA, PETITIONER,
v.
MORRIS KESSLER, et al, RESPONDENTS.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS, AND IN RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT.

JAY GREGORY HORLICK
ATTORNEY FOR RESPONDENT
MORRIS KESSLER

16 Court Street
Brooklyn,New York 11241
(212) 875-3222

TO:HON. REX E. LEE
SOLICITOR GENERAL
DEPARTMENT OF JUSTICE
WASHINGTON,D.C. 20530

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UNITED STATES OF AMERICA, PETITIONER,

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MORRIS KESSLER, et al, RESPONDENTS.

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Pursuant to Rule 46 of the Rules of this court, respondent, Morris Kessler, asks leave to file the attached response to the petition for a writ of certiorari to the United States Court of Appeals for the Eleventh Circuit without prepayment of costs and to proceed in forma pauperis. Respondent, Morris Kessler, was granted similiar relief by the District Court for the Southern District of Florida (ARONOVITZ, J.), and by Judge Aronovitz for purposes of appeal in the Eleventh Circuit Court of Appeals. On both occassions the undersigned was appointed pursuant to the Criminal Justice Act of 1964, as amended.

Dated: April 5, 1984

Yours etc.,

JAY GREGORY HORLICK
Attorney for Morris Kessler

16 Court Street
Brooklyn, New York 11241
(212) 875-3222

JAY GREGORY HORLICK

NO. 83 - 1554

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

UNITED STATES OF AMERICA, PETITIONER,

v.

MORRIS KESSLER, et al, RESPONDENTS.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

JAY GREGORY HORLICK
Attorney for Morris Kessler

16 Court Street
Brooklyn, New York 11241
(212) 875-3222

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SUMMARY OF ARGUMENT

This case was properly decided on the issues presented to the United States Court of Appeals for the Eleventh Circuit.

The motion in limine was not made by or on behalf of any of the defendants on trial, but was the result of an application by the Assistant United States Attorney.(Tr 424-440)

The issue presented in Luce v. United States (petition for cert. pending,No. 83-912) is totally unlike any issue in the instant case. The Luce case concerns a defendant's motion to restrict cross-examination about the defendant's own prior criminal conviction (Fed. R. Evid. Rule 609(a)), while the instant case concerns the use of extrinsic evidence of the subsequent acts of a defense witness (Fed. R. Evid. Rule 608(b)).

ARGUMENT

The Luce case, supra, is relied upon by the petitioner in an attempt to have this court accept two separate and distinct issues under one title. Luce was the defendant who did in fact make application to the court to restrict cross-examination of himself with regard to his prior criminal convictions. Federal Rules of Evidence Rule 609(a) specifically deals with that issue.

In the instant case a defense witness is the focus of attention. After hearing that the defense would call Robert Caldevilla to testify that no incriminating conversations took place

at the April 4 Cricket Club meeting (attended by respondent Kessler), the government explained to the court that it would examine Caldevilla concerning subsequent conversations with Agent Martinez about marijuana importation. Anticipating Caldevilla's denials the government intended to recall Martinez as a rebuttal witness to prove that the conversations had taken place and thus affecting the credibility of the witness. The government sought the ruling in advance, but seeks here to claim that the defendants are appealing an "...adverse ruling on his motion in limine..."(petition page 8). The use of Agent Martinez in rebuttal to prove the subsequent acts and thereby attack Caldevilla's credibility was clearly in violation of Federal Rules of Evidence Rule 608(b). The violation of Rule 608(b) was the basis upon which the Eleventh Circuit Court of Appeals properly reversed this conviction.

The petitioner further seeks review because the defense witness did not testify after the court made its ruling. The petitioner claims that "...a holding that the District Court's preliminary ruling is reviewable may have no other consequence than to discourage the District Courts from giving such rulings."(petition page 10)

In New Jersey v. Portash 440 U.S. 450, at 454,455 this court clearly held:

> "The State contends that the issue presented by Portash is abstract and hypothetical because he did not, in fact, become a witness. Portash could have taken the stand, testified, objected to the prosecution's

> use of the immunized testimony to impeach him, and appealed any subsequent conviction. Absent that, the State would have us hold that the constitutional question was not and is not presented. This argument must be rejected. First, it is clear that although the trial judge was concerned about making a ruling before specific questions were asked, he did rule on the merits...
>
> Second, the New Jersey appellate court necessarily concluded that the federal constitutional question had been properly presented, because it ruled in Portash's favor on the merits."

The decision in Portash, supra, is clearly conclusive on the question now offered by the petitioner. Given a proper record on appeal there can be no reason to exclude appellate review of rulings in limine, regardless of whether the witness ultimately takes the witness stand and testifies.

The remaining arguments advanced by the petitioner are specious at best. The trial court's use of a "dry run" gave all parties and the court a full and complete understanding of the testimony and the legal position of the witness. The "dry run" did in fact provide the concrete factual basis upon which the appellate court could act.

By his presence at the April 4 Cricket Club meeting Morris Kessler stood to gain immeasurably from the testimony of Caldevilla. Trial tactics dictated that Kessler remain separate and apart from the interest of respondent DiMatteo

and to be able to argue against admission of the rebuttal testimony on grounds which had nothing to do with either of his codefendants. The rebuttal testimony as proffered would have placed Morris Kessler at the scene of and as a participant in the subsequent criminal conversation, which would have represented evidence of an unchraged criminal act. Since DiMatteo called the witness Kessler could move to exclude any reference to his presence at the subsequent conversations. Any fair reading of the trial record will easily demonstrate that Caldevilla's testimony was equally relevant and vital to the defense of both Kessler and DiMatteo with respect to that one meeting.

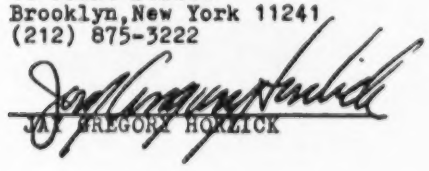
CONCLUSION

The Court should deny the petition for a writ of certiorari.

Respectfully submitted,

JAY GREGORY HORLICK
Attorney for Morris Kessler

16 Court Street
Brooklyn, New York 11241
(212) 875-3222



JAY GREGORY HORLICK

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 5,1984 a true and correct copy of the foregoing papers were mailed to:

HON. REX E. LEE
SOLICITOR GENERAL
DEPARTMENT OF JUSTICE
WASHINGTON, D.C. 20530

JAY GREGORY HORLICK
Attorney for Respondent Kessler